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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GIDDINGS & LEWIS MACHINE TOOL COMPANY,
Petitioner

v.

JOHN AND PATRICIA TRAPANESE,
Respondent

v.

HONORABLE LOUIS H. POLLAK,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ABUSE ITS DISCRETION IN FAILING TO ISSUE A WRIT OF MANDAMUS WHEN THE TRIAL JUDGE'S ORDER FOR A NEW TRIAL WAS ENTIRELY BASED ON SPECULATION INTO THE THOUGHT PROCESSES OF THE JURORS?

2. DID THE COURT OF APPEALS ABUSE ITS DISCRETION IN FAILING TO ISSUE A WRIT OF MANDAMUS WHERE THERE WAS NO ERROR COMMITTED PRIOR TO THE ENTRY OF THE ORDER FOR A NEW TRIAL AND, IF THERE WAS ERROR, WHERE RESPONDENT DID NOT PRESERVE THIS ISSUE?

3. DOES THE PROPER DEVELOPMENT OF THE LAW OF MANDAMUS AND THE PROPER JUDICIAL ADMINISTRATION OF THE FEDERAL COURT SYSTEM REQUIRE SUPREME COURT INTERVENTION AND CONSIDERATION OF THE EXTENT TO WHICH THE CONCEPT OF "SUPERVISORY MANDAMUS" MAY BE INVOKED TO OVERTURN DISCRETIONARY, BUT "BLATANTLY WRONG", NEW TRIAL ORDERS?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner Giddings & Lewis Machine Tool Company ("Giddings & Lewis") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this action on March 24, 1983.

OPINIONS BELOW

The Order (without opinion) of the Court of Appeals denying the Petition for Writ of Mandamus of Giddings & Lewis (App. 3a) is not reported. The Memorandum/ Order of the United States District Court ordering a new trial (App. 1a-2a) is not reported.

JURISDICTION

This Petition for a Writ of Certiorari is filed within ninety (90) days after the denial by the Court of Appeals on March 24, 1983 of the Petition for Writ of Mandamus by Giddings & Lewis. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

Section 1651 (a) of Title 28, United States Code, and Rules 51 and 59 (d) of the Federal Rules of Civil Procedure, which are involved, are set out verbatim in the Appendix hereto. (App. 33a).

STATEMENT OF THE CASE

Plaintiffs John and Patricia Trapanese initiated this action against Giddings & Lewis Machine Tool Company based on strict liability pursuant to Section 402A of the Restatement (Second) of Torts alleging a design defect in a machine manufactured by Giddings & Lewis. Federal jurisdiction was predicated upon diversity of citizenship and an amount in controversy in excess of $10,000.00 as set forth in 28 U.S.C. §1332. This matter was tried before the Honorable Louis H. Pollak for two weeks. Jury instructions had been prepared by the Court and presented to Counsel for both parties. After discussion they were then presented to the jury without objection or exception. It was agreed by both parties and the Court that instructions on assumption of the risk and contributory negligence were inappropriate since these matters were not issues in this case.

During the first day of deliberations, the jury returned a question to the Court inquiring as to the law of proximate cause. In response thereto the Court read its previous instructions on proximate cause. After deliberating into the evening, the jury retired without a verdict. The jury continued in its conscientious deliberations until early evening on Christmas Eve and once again retired without a verdict. The jury returned on December 27 and after further deliberations returned a unanimous verdict in favor of Defendant.

Judgement was recorded on December 28, 1982. Nine days later Judge Pollak *sua sponte* vacated the Judgment and ordered a new trial. Judge Pollak entered his *sua sponte* Order for a new trial prior to the filing of a motion for new trial by either party and without argument or presentation by either party. The sole basis for Judge Pollak's Order for new trial was his speculation as to what may have been in the minds of the jurors during their deliberations. Although contributory negligence and assumption of the risk had not been issues in the case and although the jury never presented questions to

the Trial Court concerning these issues, the Trial Court ordered a new trial on the speculation that the jury, in its three days of deliberations, may have considered these issues in reaching its verdict. It is clear that the Trial Court made such speculations in an attempt to reverse a verdict which rendered in the Court's opinion an undesirable outcome.

On January 14, 1983, Petitioner filed a Motion for Reconsideration with the Trial Court and requested an opportunity to brief and argue a Motion for New Trial, or in the alternative to certify the question to the Third Circuit Court of Appeals pursuant to 28 U.S.C. Section 1292(b).

Petitioner's request was denied by Order entered February 15, 1983 whereupon Petitioner promptly filed a Petition for a Writ Of Mandamus with the Third Circuit Court of Appeals. The Court Of Appeals permitted the filing of a brief by Respondents and then denied Petitioner's request for mandamus without opinion.

REASONS WHY WRIT SHOULD ISSUE

The Circuit Court of Appeals has so far departed from the accepted course of judicial proceedings by not granting the remedy of mandamus on the basis that the District Court abused its discretion in *sua sponte* ordering a new trial that this Court must exercise its discretionary review. When a District Court has, on its own initiative, ordered a new trial on the basis of conjecture as to what was in the minds of the jury during their deliberations, when no error or prejudice to either party is the basis for the retrial and no error has been preserved by either party, then this court must exercise its power to review and curtail such an abuse of the District Court's discretionary power to order a new trial when its acts usurp the function of the jury and require an unwarranted retrial.

I. THE THIRD CIRCUIT COURT OF APPEALS INCORRECTLY REFUSED TO EXERCISE ITS DISCRETION TO REVIEW BY MANDAMUS THE DISTRICT COURT'S ORDER FOR A NEW TRIAL EVEN THOUGH THE DISTRICT COURT EXCEEDED ITS JUDICIAL POWER BY ORDERING A NEW TRIAL BASED ON SPECULATION AND CONJECTURE AS TO THE THOUGHTS OF THE JURY DURING ITS DELIBERATIONS.

Mandamus is available for interlocutory review "under exceptional circumstances" amounting to judicial usurpation of power. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Where the District Court's Order for a new trial is "blatantly wrong," mandamus relief is indeed justified. *Central Microfilm Service Corp. v. Basic-Four Corp.*, 688 F.2d 1206 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1191 (1983). Mandamus is proper where the trial Court "has committed a clear abuse of discretion." *Grace Lines, Inc. vs. Motley*, 439 F.2d 1028, 1032 n.2(2d Cir. 1971). While the circumstances are not often found, clearly review by mandamus is demanded when the trial court *sua sponte* orders a needless retrial based purely upon its speculation, after the jury rendered a verdict, as to what might have been in the minds of the jurors during their deliberations.

These cases recognize that mandamus is proper in limited circumstances; a needless retrial based on faulty legal reasoning can be the basis for the appellate court to exercise its discretion to review by mandamus. The exercise of reasoned judicial judgment is the *raison d'etre* of the judicial system. Where a decision of the trial court to grant a new trial is "blatantly wrong," then even the broad discretion of the District Court has been exceeded.

Although an order for new trial normally is not appealable, it is precisely where there has been an abuse of discretion that "the desirability of present review

outweigh[s] the policies which confine appeals to the review of final orders." *Id.* Mandamus must be used to "confine the lower court to the sphere of its discretionary power." *Will v. United States*, 389 U.S. 90, 104, 88 S. Ct. 269, 278, (1967); *Bankers Life & Cas. Company v. Holland*, 346 U.S. 379, 383, 74 S. Ct. 145, 148 (1953).

> Mandamus will lie, in the sound discretion of the appellate court, where the trial court has exceeded or wrongfully refused to exercise its judicial power or has committed a clear abuse of discretion.

Grace Lines, Inc., supra at 1031, n.2 (citations omitted).

Therefore, when the District Court has abused its discretion by ordering a new trial then

> mandamus is required since it is the only way in which the appellate court can correct the egregious error of the district court in setting aside the verdict of the jury and in scheduling a needless retrial.

Id. at 1034.

The Trial Judge concedes, in his Memorandum/Order, that the only reason for his grant of a new trial was that after the jury had rendered its verdict he had given "further thought" to the jury's questions and concluded that when the jury asked a question directed to the issue of proximate cause it may have been considering the issue of contributory negligence which was otherwise not in the case. (App.2a) Petitioner submits that unless this Court grants certiorari and orders the issuance of this extraordinary writ, the mere speculation of a Trial Court as to what might have been in the jury's mind when it considered its verdict will be permitted to be substituted for the valid verdict of the jury after a two week trial and three days of jury deliberations. This Court ought not to permit the proper function of a jury as the finder of fact to be thus subverted; the Trial Court's *speculation* as to what might have led to the ultimate result is a substitution of its judgment for the jury's

verdict and will now subject the parties and the Court to a second trial.

The District Court's new trial order was based entirely on the conjecture that the jury *may* have been concerned with the conduct of the Plaintiff, even though the conduct of the Plaintiff was not an issue for the jury. The Trial Court in its order for a new trial refers to the concerns of the jury during their deliberations and whether they were misguided by these concerns in reaching their verdict. There is simply no rational basis for speculation as to what the jury may have been thinking to be a sufficient basis for a new trial. A district judge may not order a new trial on this basis. Hence, review by mandamus should have been permitted by the Court of Appeals.

In *Grace Lines, Inc., supra,* the jury returned a verdict for Defendant whereupon each juror was polled. The eleventh juror when asked if she found for Defendant replied, "yes it had to be unanimous." *Id.* at 1030. The trial court assumed from this statement that the verdict was not unanimous and therefore declared a mistrial which was then followed by an order for a new trial. Defendant applied for a writ of mandamus to the Court of Appeals which was granted.

The Court of Appeals found that the issue presented was whether the motivation of the juror, as described in her statement, "was so unlawful or improper as to require the court to nullify her vote and therefore the entire verdict." *Id.* at 1031. Even when the trial court had a statement from a juror which implied disagreement with the verdict, it was held that delving into the juror's mind is *impossible* and cannot be a basis for ordering a new trial. *Id.* at 1032. It is simply not permissible to inquire into the motivation of the jury.

> It is not possible to determine mental processes of jurors by the strict tests available in an experiment in physics; we have to deal with human be-

> ings, whose opinions are inevitably to some extent subject to emotional controls that are beyond any accessible scrutiny.

Id. at 1032-33 (quoting *United States vs. Grieco*, 261 F.2d 414, 415-16 (2d Cir. 1958) (per curiam), *cert. denied* 359 U.S. 907 (1959)).

In the instant case, the basis for ordering a new trial is even more speculative than in *Grace Lines, Inc., supra*. In the present case, the jury was polled; the response was unanimous. Absolutely no statements were given as to the motivation of jurors for reaching the verdict. Nevertheless, the Trial Court, nine days post verdict, attempted to delve into the minds of the jurors and based on that speculation *sua sponte* ordered a new trial.

It is well established that mere speculation will not suffice to prove that the jury reached its verdict improperly. *Luck v. Baltimore & Ohio R.R. Co.*, 510 F.2d 663 (D.C. Cir. 1975); 6 A *Moore's Federal Practice* Par. 59.08 [4] at 59-115. Pure speculation is not a sufficient basis to grant a Motion for a new trial. *Pitts vs. Electro-Static Finishing, Inc.*, 607 F.2d 799 (8th Cir. 1979).

The Trial Court's Order for a new trial did not refer to any error which necessitated a new trial, nor did it state that either party had been prejudiced. To order a new trial without any apparent erroneous ruling and, more importantly without any prejudicial error, simply amounts to a substitution of the Court's judgment for that of the jury. This is a trial which took two weeks. The trial was hotly contested. There were three days of conscientious jury deliberations over the Christmas holidays. In such circumstances, the determination of the jury should not be set aside.

"[T]he trial judge should not interfere with the time-honored right of the jury, in the exercise of its collective judgment, to make a just determination of a Defendant's liability and the damages sustained by a Plaintiff for to do so effects a denigration of the jury sys-

tem . . ." *Mainelli v. Haberstroh*, 237 F. Supp. 190, 192 (M.D. PA. 1964), *aff'd.*, 344 F.2d 965 (3rd Cir. 1965). The determination of a jury should not be set aside, except under unusual circumstances. *Fried v. McGrath*, 133 F.2d 350 (D.C. Cir. 1942). A Court should not interfere with a jury's conscientious deliberations. *Mainelli v. Haberstroh, supra.* The trial judge "should *not* act merely as a 13th juror and set a verdict aside simply because he would have reached a different result had he been the trier of fact." *Borras v. Sealand Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978) (emphasis added).

Petitioner therefore contends that it is imperative for this Court to review this abuse of discretion whereby the District Court has usurped the Defendant's right to jury trial, has negated two weeks of extensive trial and *three days* of jury deliberations and will now force the parties into a new trial. It is precisely this wasteful retrial of issues, which were carefully presented to a jury and over which it conscientiously deliberated, that contributes to an already overburdened judicial system. The promulgation of the Federal Rules of Procedure, their interpretation by the Courts, and the relentless opinions by the Judges of the Circuit Courts of Appeals and Justices of this Court have consistently striven to avoid repetitious and unwarranted duplication. Courtroom errors have been found harmless when it was not clear that an error had tainted a jury and verdicts have been left intact. Here we have the Court ordering an entirely new and extensive trial when no known error was committed; instead, the Court speculates that the jury may have considered some extraneous element.

In ordering a new trial on such tenuous grounds, the Trial Judge has merely placed another trial on an overtaxed system. The duplication of litigation occasioned by this type of action has been the subject of repeated criticism by the judiciary, the bar and the public.

A commentator has recently described the judicial overwork:

> The statistics reveal that a monster is loose in the Federal Courts. Fed by 20,000 to 25,000 cases each year, its rampant growth will not soon slow down.

Want, Robert, The Caseload Monster in the Federal Courts, 69 *A.B.A.J.* 612, 615 (1983).

Chief Justice Burger has already noted that there has been an "explosion" in Federal litigation. *Ibid.* at 613. Courts and litigants should not bear the burden of repetitive trials unless absolutely necessary. *General Motors Corp. vs. Lord,* 488 F.2d 1096 (8th Cir. 1973).

II. THE CIRCUIT COURT ABUSED ITS DISCRETION IN FAILING TO ISSUE A WRIT OF MANDAMUS WHEN THE TRIAL JUDGE ORDERED A NEW TRIAL EVEN THOUGH NO ERROR WAS COMMITTED AND, EVEN IF THERE WERE ERROR, SUCH ERROR WAS WAIVED.

The Trial Judge ordered a new trial *sua sponte* pursuant to Fed.R.Civ.P. 59(d). That Rule permits the Trial Court to order a new trial on its own initiative on the same basis for which it might have granted a new trial on the motion of any party. Since there was no error in the Trial Court's instructions and since, in any event, Respondent failed to properly preserve the issue upon which the Trial Court relied in granting a new trial, it was such blatant error to order a new trial that a writ of mandamus should have been issued.

In the face of a jury's adverse verdict, in order to give Plaintiff a new trial, it must be demonstrated that the Court's ruling was not only erroneous but was so prejudicial as to amount to reversible error. Fed.R.Civ.P. 61; *Skill v. Martinez,* 677 F.2d 368 (3d Cir. 1982); *Kube*

v. Bethlehem Steel Corp., 390 F.2d 506 (3d Cir. 1968). Clearly, the Trial Court, in its Order for a new trial, makes no mention of error or prejudice to either party.

There is no contention by the Trial Court that something occurred in the course of the trial which resulted or which may have resulted in the jury receiving "a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible." *Lind v. Schenley Industries, Inc.*, 278 F.2d 79,90 (3d Cir.), *cert. denied*, 364 U.S. 835, 81 S. Ct. 58 (1960); *O'Neil v. D.R. Grace & Company*, 410 F.2d 908, 914 (5th Cir. 1969).

Instead of referring to an error or prejudice to either party (which did not occur), the Trial Court attempted to delve into the minds of the jurors and speculate on their thoughts and secret deliberations. Clearly, such an attempt is conjecture and cannot serve as a basis for ordering a new trial.

During the first day of deliberations, the jury presented the following question concerning proximate cause which the Trial Judge partially utilized as the basis for his new trial Order: "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the accident, or is it only necessary to feel that it contributed to the accident?" (App. 10a). The Trial Court told counsel that this question on proximate cause would be best answered "simply by re-reading to the jury what I said about the sixth element, which is about proximate cause." (App. 11a). At that time, neither counsel raised the possibility that the jury might be considering contributory negligence of the Plaintiff when it asked this question about causation. The Court then re-read its instructions on proximate cause, and neither party objected or took exception to the charge as then given. (App. 15a).

Only after the jury retired that day did counsel for Plaintiff begin to speculate that the jury might be considering the conduct of Plaintiff in their deliberations (App. 18a) and brought this to the attention of Judge Pollak. At that time Judge Pollak responded that he

> would be quite troubled about introducing a new point for charge at this time, especially one [that] would seem so programmatically geared to saying, 'Don't go down a particular line which somebody is worried you may be on.' I think the charge as we gave it was a coherent whole which focused the jury's attention on the elements which if proved would entitle the Plaintiff to a determination of liability, and I think they should know from the answer which they have received to *their question about proximate cause the proper theories to proceed on*. (App. 18a) (Emphasis added).

Counsel for Defendant brought to the Court's attention that when the charge was made to the jury it was *agreed upon by both attorneys with no exceptions*, and was fair, reasonable and correct in its statement of the law. (App. 19a). Counsel for Plaintiff thoroughly agreed stating "I am not taking away the charge as given, it's correct" (App. 20a), but based on his speculation, counsel for Plaintiff requested the Court to inject an entirely new instruction on contributory negligence. The Court forcefully declined stating:

> (I) think the injection of such a new line of legal discussion at this time is so likely to have a kind of coercive effect on the jury's thinking as to be read by them as an impulsion from the Court to decide this case in favor of the Plaintiffs on the liability side, I think the risk of that is so substantial, Mr. Schwartz, that I think that would be a wrong thing to do. I am not arguing that had the charge contained such an injunction about the nonrele-

> vance of contributory or comparative negligence that the charge would have been erroneous in some reversible-error sense. I thought it would have been a mistake, and for [that] reason declined so to instruct the jury, as I would not instruct the jury on lots of matters which are not in my judgment pertinent to the statement [such as] these are the claims that are to be made and these are the appropriate defenses, but although I would not have regarded it as reversible error, I can put myself in the position presumably of somebody who would have to review such a charge to have included an analysis of the kind that you would argue, I thought it the better part of prudence not to include anything of the sort, and now to do so, unvarnished as a new injection not in the context of a whole large reorganization of a whole conceptual framework would seem to me a wrong thing to do, a form of judicial intervention in the jury's processes that I don't think I am authorized to pursue. (App. 20a, 21a).

What the Court unhesitatingly decided, when the trial was fresh in the Court's mind and the jury instructions were meticulously prepared and correctly given, was that an instruction on contributory negligence would be an error and usurpation of the jury processes. How could such an instruction therefore suddenly become a correct and necessary instruction nine days after the verdict? Not only did the Court find that such an instruction would be wrong and an intervention with the jury, but the Court also found that any need for such an instruction was based entirely on speculation, speculation by counsel for Plaintiff with which the Court did not agree.

On day two of deliberations, the jury once again posed the same question on proximate cause, asking, "Is it necessary to feel that the defective condition was the primary cause or the most probable cause of the acci-

dent, or is it only necessary to feel that it contributed to the accident?" (App. 23a) The Trial Judge remained firm and, in response to counsel's conjecture as to what the jury was thinking that caused it to ask the question, the Court dismissed this conjecture as arbitrary speculation.

> Mr. Schwartz, of course we are all speculating. I tend to think that you are wrong in your speculation that primary means to the jury first in time, because the form of their question, if you remember, was, "Is it necessary to feel the defective condition was the primary cause or the most probable cause of the accident, or is only necessary," and so forth. I read their question as one which equates primariness and probability, and I remain of the view that it would not be appropriate for me to volunteer to postulate about contributory negligence. Had the jury asked, that would be something else again. (App. 27a)

Thus, the Court found that speculation as to what was in the mind of the jury was to be given no weight, which is precisely the value that the court in *Grace Lines, Inc. supra*, and *United States v. Grieco, supra*, placed on such speculation.

Furthermore, as noted by the Trial Court at the time, the jury never asked about contributory negligence or the conduct of the Plaintiff. Their questions concerned proximate cause and the answers to those questions given by the Court correctly and clearly explained the meaning of proximate cause to which neither party made objection or took exception.

The failure of either party to make an objection or take exception to the Trial Court's refusal to instruct the jury on contributory negligence is significant. The failure of a party to object to the Trial Court's decision precludes the Trial Court from ordering a new trial on the basis that the Trial Court's decision was an error.

Harkins v. Ford Motor Co., 437 F.2d 276 (3d Cir. 1970); Wright & Miller, 11 *Federal Practice & Procedure* §2805 at 39; *See Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973).

It is Hornbook law that the failure to object to a Court's response to a jury on a jury's request for additional instruction precludes the raising of that issue on appeal when Counsel had the opportunity to object. *Nimrod v. Sylvester*, 369 F.2d 870 (1st Cir. 1966); 5a *Moore's Federal Practice* Par. 51.04 at 51.27; F.R.C.P. 51; *Holloway v. J.B. Systems. Ltd.* 609 F.2d 1069 (3rd Cir. 1979). Even assuming for the sake of argument that there was error, that error has been waived and certainly cannot be the basis for ordering a new trial. For the instant Trial Judge to have issued an order for a new trial, in the face of a clear failure to object, can be nothing but blatant error.

Respondent's attorney certainly gave every impression that he was withdrawing any prior objections that he may have had to the Trial Judge's answer to the jury's question and was, in fact, acceding to the Trial Judge's response to the jury's question.[1]

The Trial Judge is certainly abusing his discretion in basing an Order for a new trial on an issue not properly preserved for Appellate review.

Fed.R.Civ.P. 51 requires Counsel to make it abundantly clear to theTrial Court the objecting party's position. *Corriz vs. Naramjo*, 667 F.2d 892, 896 (10th Cir. 1982); *Barney vs. Staten Island Rapid Transit Railway*

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1. Following the Trial Judge's response to the jury's first question on proximate cause and after the jury returned to its deliberations, Respondent's attorney stated that the jury should "be instructed that no conduct on the part of Mr. Trapanese can play any part in their deliberations." (App. 18a). Critically, Respondent's attorney does not raise this point on day two of the jury deliberations in response to the jury's question on proximate cause. At that time, Respondent's attorney acceded to the trial Judge's response.

Co., 316 F.2d 38 (3rd Cir. 1963). The purpose of the Rule is clear:

> To prevent a litigant from taking advantage of an error which could be rectified by the Court if called to its attention by timely and specific objection.

Corriz, supra at 896.

Had Respondent's attorney made his objection clear, the Trial Court would have been afforded the opportunity to analyze the supposed error and rectify it if it were found to exist. The failure to do so means that the foundation for the trial court's opinion was not preserved for review and therefore can not serve as a basis for ordering a new trial.

Petitioner therefore contends that there was no error in the jury instructions or answers to the jury questions which would require or support the drastic remedy of an order for new trial. Furthermore, counsel failed to preserve any claim of error by objection or exception and when it has not thereby been preserved, the alleged error cannot serve as the basis for a new trial order.

III. THE PROPER DEVELOPMENT OF THE LAW OF MANDAMUS AND THE PROPER JUDICIAL ADMINISTRATION OF THE FEDERAL COURT SYSTEM REQUIRE SUPREME COURT INTERVENTION AND CONSIDERATION OF THE EXTENT TO WHICH THE CONCEPT OF "SUPERVISORY MANDAMUS", FIRST ADDRESSED IN LA BUY VS. HOWES LEATHER CO., MAY BE INVOKED TO OVERTURN DISCRETIONARY BUT "BLATANTLY WRONG" NEW TRIAL ORDERS AND THUS TO PREVENT "NEEDLESS RELITIGATION" AND TO PRESERVE THE INTEGRITY OF THE JURY SYSTEM

It is Petitioner's contention that this Court's most recent pronouncement concerning the use of the ex-

traordinary writ of mandamus to overturn new trial orders, set forth in *Allied Chemical Corp. vs. Daiflon, Inc.*, 449 U.S. 33 (1980), is inadequate in that it fails to consider its application in reviewing new trial orders which are "blatantly wrong", which cause needless retrials and which, in the final analysis, are an affront to the jury system. *Central Microfilm Service Corp. vs. Basic-Four Corp.*, 688 F.2d 1206, 1212 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1191 (1983). By failing to discuss *La Buy vs. Howes Leather Co.*, 352 U.S. 249 (1957) and by failing to recognize the distinction between the traditional concept of mandamus, as set forth in *Will vs. United States*, 289 U.S. 90 (1967) and *Bankers Life and Casualty Co. vs. Holland*, 246 U.S. 379 (1953), and "supervisory mandamus", this Court has left the impression that the latter concept is no longer a viable one and that discretionary new trial orders simply may not be reviewed without awaiting appeal from final judgment. Unless this Court moves to acknowledge this distinction and to reaffirm the validity of *La Buy*, the Circuit Courts of Appeals will regard themselves as completely powerless to prevent the wasteful and unnecessary relitigation which follows "blatantly wrong" new trial orders. In view of the ever-growing volume of cases on the Federal Court dockets, and the overall scarcity of judicial resources, it is submitted that this sort of "supervisory control of the District Courts by the Courts of Appeals is necessary to the proper judicial administration in the federal system". 352 U.S. at 259-60. This controversy provides the appropriate vehicle within which this Court may direct the Circuit Courts of Appeals on this important question.

In *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33 (1980), the District Court set aside a large Plaintiff's verdict in an antitrust case and granted a new trial due to errors in certain evidentiary rulings and because the evidence did not support the amount of the jury award. The Tenth Circuit issued a writ of mandamus, di-

recting that the portion of the District Court's order granting a new trial be vacated. It based its conclusion on what it deemed to be the arbitrary and erroneous nature of the District Court's decision. This Court granted certiorari and, in *per curiam* opinion, reversed the Tenth Circuit's order granting the writ of mandamus.[2] In so doing, this Court decided "peremptorily and summarily", *Id.* at 191 (Blackmun, J., dissenting), the circumstances which justify a federal appellate court's issuance of a writ of mandamus to overturn a trial Court's order granting a new trial.[3] It is Petitioner's contention that these circumstances are not exhaustive and should be broadened to encompass the circumstances presented herein.

Petitioners respectfully submit that the rationale underlying this Court's extraordinarily restrictive attitude toward the issuance of mandamus to overturn a new trial order in *Allied Chemical* is not present here. In *Allied Chemical*, this court stressed that "[t]o overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review". *Id.* at 36, 101 S.Ct. 188, 191. This policy is one of the important policies underlying the final judgment rule. "Finality is not served, however, by needless relitigation and it is proper to consider whether appellate

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2. Justices Stewart and Stevens took no part in the consideration or decision of the *Allied Chemical* case. Justice Blackmun dissented and was joined by Justice White.

3. In this regard, the Court in *Allied Chemical* stated, in pertinent part, that

> [o]nly exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy . . . In order to insure that the writ will issue only in extraordinary circumstances this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires . . . and that he satisfy the "burden of showing that the right to issuance of the writ is 'clear and indisputable' "

Id. at 35, 101 S.Ct. 188, 190. (citations omitted).

review is 'fundamental to further conduct of the case.' " *Central Microfilm Service Corp. v. Basic-Four Corp., supra.* at 1212 (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54 (1964)).

Moreover, it is submitted that the instant case falls within the class of cases vaguely referred to in footnote 3 of the Court's opinion in *Allied Chemical*,[4] and that this case provides a unique opportunity for the Court to elaborate upon the circumstances in which the use of mandamus — specifically "supervisory mandamus" — is appropriate to review discretionary orders by a trial court judge. Petitioners maintain that the proper development of the law requires that this important application of mandamus be given plenary consideration by the court.

That the guidelines set forth in *Allied Chemical* are inadequate to deal with the broad application of mandamus in all new trial situations is illustrated through an examination of the Eighth Circuit's decision in *Central Microfilm Service Corporation v. Basic-Four Corporation, supra.* In that case, the Trial Court, following a sec-

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4. Footnote 3 of *Allied Chemical* provides as follows:
Even if it be appropriate in certain circumstances to use mandamus to review a discretionary order by a trial court, the new trial order entered in this case would not appear to be a likely candidate. A trial judge is not required to enter supporting findings of facts and conclusions of law when granting a new trial motion. *See* Fed.Rule Civ.Proc. 52 (a). It cannot be contended with any certainty that the trial court in this case, when entering its oral order granting a new trial, intended to set forth each and every reason for its order. The trial court did note, however, that it had made errors in the admission of certain documentary evidence and that it felt the petitioners had not received a fair trial. Given that the Court of Appeals did not have a complete transcript of the proceedings before it, see n.1, *supra*, and that there could be other unarticulated bases for the new trial order, it would seem all but impossible for the Court of Appeals to hold as a matter of law that the trial court clearly abused its discretion in entering the new-trial order.
Id. at 191.

ond trial, ordered the Plaintiff to accept a remittitur or proceed to a third trial. The Eighth Circuit then granted Plaintiff's mandamus petition and directed that judgment be entered in the full amount of the jury verdict returned in the second trial. This Court denied certiorari. In rendering its decision, the Eighth Circuit set forth the applicable law as follows:

> Mandamus review generally is available only in extraordinary circumstances and such review of new trial orders in particular is "rarely" justified. *Allied Chemical Corporation v. Daiflon, Inc., supra.*, 449 U.S. at 36, 101 S.Ct. at 191. Because the right to mandamus must be "clear and indisputable," a district court's action generally must be "blatantly wrong" to justify mandamus relief; arguable error within the scope of trial court discretion is not a proper basis for mandamus. *Cf. Id.* at 35-36, 101 S.Ct. at 190-191; *General Motors Corp v. Lord*, 488 F.2d 1096, 1100 n. 2 (8th Cir. 1974). Other factors which bear on the appropriateness of mandamus review include the need to correct error which is likely to recur and to provide guidelines for the resolution of novel and important questions. *See Schlagenhauf v. Holder*, 379 U.S. 104, 111-112, 85 S.Ct. 234, 238-239, 13 L.Ed.2d 152 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 254-255, 258, 77 S.Ct. 309, 312-313, 314, 1 L.Ed.2d 290 (1957); *General Motors Corp. v. Lord, supra,* 488 F.2d at 1099. Perhaps the most fundamental concern is the avoidance of piecemeal litigation and disturbance of the orderly administration of the courts — key policies underlying the final judgment rule. *See Allied Chemical Corporation v. Daiflon, Inc., supra,* 449 U.S. at 36, 101 S.Ct. at 191. Finality is not served, however, by needless relitigation and it is proper to consider whether appellate review is "fundamental to further conduct of the case." *Gillespie v. United*

> *States Steel Corporation*, 379 U.S. 148, 152-154, 85 S.Ct. 308, 310-312, 13 L.Ed. 2d 199 (1964); *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 187 (8th Cir. 1972).

Id. at 1212.

As far as Petitioner's research reveals, the *Central Microfilm* case is the first instance in which a federal appellate court has emphasized the appropriateness of "supervisory mandamus" to address the "needless relitigation" which necessarily follows a "blatantly wrong" new trial order. In effect, the Eighth Circuit Court of Appeals has taken the lead in seeking to revive the concept of "supervisory mandamus", first discussed in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), which was completely and inexplicably ignored in the *Allied Chemical* decision.[5] In this era of excessively crowded lower court dockets, it most certainly is in the interest of the fair and prompt administration of justice for this Court to at least *consider* the possible application of "supervisory mandamus" to prevent needless retrials.

As suggested above, any examination of this important branch of the extraordinary writ of mandamus must begin with a review of the *La Buy* decision. In *La Buy*, this Court approved the Seventh Circuit's granting of a writ of mandamus to prevent a trial court's questionable practice of regularly referring antitrust cases for trial before a special master under Rule 53(b) of the Federal Rules of Civil Procedure. A commentator has described the significance of the *La Buy* decision as follows:

> By concluding that the practice in issue was only questionable — that the discretionary power under rule 53(b) was being used too often — and by

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5. This Court's failure to recognize the concept of "supervisory mandamus" in *Allied Chemical* is especially disturbing in that the Tenth Circuit's grant of mandamus in that case was based upon this very doctrine.

approving the writ as much to discourage the practice as to bar its use, the Court signalled an expansion of the mandamus power beyond traditional limits.

Although Justice Clark's majority opinion in *La Buy* pays lip service to the traditional standard by stating that Judge La Buy had abused his power, it is rather clear that in the traditional sense there was no abuse of power involved. The practice of the district court to which the writ was directed in *La Buy* was specifically authorized under rule 53 (b) as long as "some exceptional conditions [required] it," and determination of exceptional conditions was left to the trial judge. Thus, it could not be said that the district judge acted without or beyond his power in referring cases to a master. A judge always has power to enter an erroneous order.

Rather than being a usurpation of power case, *La Buy* is viewed by both courts and commentators as a precedent for expanded appellate court supervision of lower courts. The implication has arisen from *La Buy* that mandamus may be used to discourage an erroneous practice and prevent its recurrence, and in this context it is the likelihood of recurrence and the need to prevent it that are the critical factors, not the jurisdictional excess or usurpation of power which were determinative under the traditional standard. Hence, notwithstanding the actual absence of usurpation of power in the traditional sense, the Supreme Court approved the writ, stating:

> 'We believe that the supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Court of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here.'

Can the Federal Courts Keep Order in their Own House? Appellate Supervision through Mandamus and Orders of Judicial Council, 1980 B.Y.U. L. Rev. 233, 241 (1980) (footnotes omitted).

Clearly, the abuse of discretion which warranted the issuance of mandamus in *La Buy* is no more severe than that which has occurred in the instant case. Without question, Judge La Buy and Judge Pollak in the instant case, acted within their "power" under Rule 53(b) and Rule 59(d) respectively.[6] Furthermore, in this instance, as in *La Buy*, the likelihood of recurrence is great and the need to prevent such recurrence is paramount. Just as District Court judges cannot be permitted to routinely shirk their responsibility by referring difficult and time-consuming matters to special masters, despite having the "power" to do so, trial judges should not be permitted to order a new trial *sua sponte* based on nothing more than idle speculation as to what the jury might have been thinking in rendering its verdict. Not only is the jury system entitled to more protection than this, but the orderly and efficient administration of justice demands that "needless relitigation" be prevented. Our seriously overworked federal judicial system can no longer afford to shrug its shoulders at the baseless rulings of trial judges simply because the judge possesses the "power" to make such a ruling, when the result is to waste the valuable resources and energies of the Court, the bar and the litigants.

> The *La Buy* line of cases supports the exercise of "inherent powers of appellate jurisdiction to effectuate what seems to . . . be the manifest ends of justice," whether that jurisdiction is exercised to correct defiance of a higher court, delay of justice,

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6. It is Petitioner's contention that although Judge Pollak possessed the authority under Rule 59(d) to order a new trial on his own initiative, this authority was not exercised within the constraints set forth in Fed.R.Civ.P. 59(a) and 61.

> or judicial bias and whether the misconduct is isolated or recurrent. All these considerations are within the "vital corrective and didactic . . . aims [which] lay at the core of . . . [the] decision in *La Buy* and *Schlagenhauf v. Holder*, [379 U.S. 104 (1964)].

Id. at 247.

The case at bar provides the Court with an ideal opportunity to set forth the scope and the boundaries of the appellate courts' supervisory authority under the All Writs Act, a task which has not been undertaken since this Court's decision in *La Buy*. As another commentator has observed: "The task is to give a definition of that practice which explains both how it differs from traditional mandamus, and at the same time how it is kept from being a system of discretionary interlocutory review." Note, *Supervisory and Advisory Mandamus under the All Writs Act*, 86 Harv. L. Rev. 595, 608 (1973). In so doing, this Court will not only succeed in reviving a forgotten, yet viable, branch of the law of mandamus, but on a more practical level, will also have an opportunity to officially recognize and address the problem of "needless relitigation" and, hopefully, to preserve the integrity of the jury system.

CONCLUSION

If the decision of the Court of Appeals, in refusing to issue a Writ of Mandamus is permitted to stand, the decision will be seen as an open-ended invitation for new trial orders based on speculation into the thought processes of the jury, when no error was committed and when no error was certainly preserved. Reversal of the decision of the Court of Appeals will serve as appropriate precedent to bar needless relitigation.

Respectfully submitted,

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